No. 2715.

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Ong Chew Hung, also known as Ong Gin Lung,
Appellant,
vs.
Alfred E. Burnett, Inspector in Charge United States Immigration Service at Tucson, Arizona,
Appellee.

BRIEF OF APPELLEE.

Thomas A. Flynn,
United States Attorney;
Samuel L. Pattee,
Assistant United States Attorney,
Counsel for Appellee.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

Filed
FEB 1 5 1916
F. D. Monckton

No. 2715.

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Ong Chew Hung, also known as Ong Gin Lung, *Appellant,*	
vs.	
Alfred E. Burnett, Inspector in Charge United States Immigration Service at Tucson, Arizona, *Appellee.*	

BRIEF OF APPELLEE.

The brief for the government in the companion case of Ong Seen v. Burnett, No. 2714, was written before the receipt of the brief of counsel for the appellant. That brief was written upon the basis of the argument made in the court below, but since receiving and reading the briefs of the appellants in these two cases, it is seen that some of the positions taken by them in the District Court have been abandoned, and some points made that were not presented to that court. Following

the example of counsel for the appellants, it is therefore asked that what is said in this brief and the authorities herein cited may be considered as applying also to the other case.

STATEMENT OF THE CASE.

The appellant was held for deportation under an order of the Secretary of Labor, who assigned the following ground for deportation:

"That the said alien is unlawfully within the United States in that he has been found therein in violation of the Chinese exclusion laws, and is therefore subject to deportation under the provisions of section 21 of the above-mentioned (Immigration) act."

On August 14, 1903, the appellant was admitted at the port of San Francisco, Cal., as the minor son of a merchant, and the record of that landing is included in the return in this case. Some three years subsequent to his landing he proceeded with his father and other members of the family to the vicinity of Antioch, Cal., where the family engaged in vegetable gardening. It appears further from the testimony that in the year 1907 he returned to San Francisco and became connected, ostensibly as a partner, in a mercantile firm in that city. Further, that based upon that mercantile relation, he applied to the immigration officers at San Francisco for a return certificate as a merchant, made a trip to China in 1909, returning in 1911, within less than three years from the time these deportation proceedings were instituted. Soon after his return to the United States on this occasion he proceeded to Phoenix, Ariz., where he at once became an active partner

and laborer in a restaurant. The appellant claims that he still retains his interest in the San Francisco mercantile firm, but avers that he has never received any dividends from his investment therein.

ARGUMENT.

I.

The original entry of the appellant was unlawful.

It is contended that his original entry was unlawful because on the facts disclosed by the record his alleged father was not then a merchant within the meaning of that term, as it is defined by the Act of Congress of November 3, 1893. That act defines a merchant in the following language:

"The term 'merchant' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant."

By this language Congress intended a complete and comprehensive definition of the term merchant, and as was said by this court:

"It will be observed that the definitions of the act are very careful and confined, and we may not enlarge them."

Lai Moy v. U. S., 66 Fed. 955.

Under this definition, the evidence justified the conclusion of the immigration officers that the father of

this alien was not a merchant within this statutory definition at the time the alien first landed. The alien at a hearing held under the departmental warrant proceedings, same being part of this record, gave testimony from which we quote the following:

"Q. When did you first come to the United States, and where did you land?

A. I first came to the United States in KS 29, 7th month, 15th day (August 7, 1903), and landed in San Francisco, ex ss Coptic.

Q. How old were you at that time?

A. 18 years old.

Q. Under what status were you landed?

A. Landed as a merchant's son, under the name Ong Chew Hung.

Q. Where was your father living at that time?

A. 210 Jackson street, San Francisco, Cal." [Transcript of Record, pages 42-43.]

* * * * * * * * *

And again:

"Q. What was your father doing at the time you first arrived in the United States?

A. He was conducting a factory, making shirts and overalls.

Q. Was he interested in the factory?

A. He was the owner.

Q. Sole owner?

A. Yes.

Q. Where was the factory located?

A. 210 Jackson street, San Francisco.

Q. What was the name of the factory?

A. Wing Lung.

Q. How many men did he employ at that factory?

A. Between 20 and 30.

Q. What did your father do with the products of his factory?

A. He had a contract to make these shirts for several firms; Murphy-Mosstein Co., and after the shirts were made up he took them to these firms.

Q. These firms furnished the goods and he made up the goods into shirts and overalls, is that the idea?

A. Yes.

Q. How long did your father continue to operate that factory?

A. Until the San Francisco fire." [Transcript of Record, pages 43-44.]

* * * * * * * * *

"Q. And then where did you go?

A. I went to Antioch.

Q. Did you father and his family accompany you to Antioch?

A. Yes.

Q. And has your father and the rest of his family continued to live at Antioch ever since?

A. Yes.

Q. When your father went to Antioch from San Francisco, did he immediately go into the vegetable gardening business?

A. Yes.

Q. Did you live on the ranch or in the town?

A. On the ranch." [Transcript of Record, page 44.]

* * * * * * * * *

"Q. Did your father ever have any interest in a mercantile establishment anywhere?

A. No, except that factory.

Q. Did he ever have an interest in a mercantile establishment?

A. No." [Transcript of Record, page 49.]

It is true that at a later day the alien attempted to change or modify his testimony so as to lay the foundation for a claim that his father was a merchant at the time of the son's first entry, but it was obviously for the immigration officers to determine which statement was truthful. And it excites no surprise that they believed the statement he first made, with no object in falsifying, in preference to that which was later made, when he may have been advised as to the law and had an opportunity to consult with friends and had learned the effect of his prior testimony. It goes without saying that when a witness makes contradictory statements, the question of which is truthful is entirely one for the triers of fact, and even were this court considering the question as on appeal, a finding based on one of the conflicting statements could not be disturbed. Certainly, under the limited power of review on *habeas corpus,* the court's inquiry is ended when it sees that there was some evidence tending to sustain the findings of the immigration officers.

It may be regarded as established, therefore, that the occupation of the father at the time this alien first landed was as testified by the alien in the first instance. The question of law, therefore, is whether one manufacturing garments for others under contract, and not engaged in the sale of the manufactured products, but solely engaged in manufacturing for others, is a merchant. Bearing in mind that the statutory definition which, as held by this court, must be narrowly construed, provides that a merchant is one who "Is a person engaged in buying and selling merchandise at a fixed place of business," it is obvious that the ap-

pellant's father was not at the time referred to a merchant. He might be termed a manufacturer, a contractor, or a manufacturing contractor, but he would not be a merchant within the ordinary meaning of that term, even were there no statutory definition.

State v. Richeson, 45 Mo. 575.

But taking into consideration the fact that Congress has by its definition narrowed the ordinary meaning of a merchant and effectually prevented any enlargement of its meaning beyond the strict letter of its terms, no room for doubt is left that upon the facts which the immigration officers were justified in finding, and did find, the alien's father was far outside the statutory definition of the term merchant.

As showing further that the term merchant, after being defined by Congress, has been given a narrow construction, and that those not strictly within its terms have been considered either laborers or at least not within the exempt classes, see the following cases:

United States v. Gin Hing, 8 Ariz. 416;
United States v. Chung Ki Foon, 83 Fed. 143;
In re Leung, 86 Fed. 303;
Mar Bing Guey v. United States, 97 Fed. 576;
United States v. Yong Yew, 83 Fed. 832;
Lai Moy v. United States, 66 Fed. 955;
United States v. Yee Gee You, 152 Fed. 157;
Lew Quen Wo v. United States, 184 Fed. 685.

The appellant entered this country in the first instance as the minor son of a merchant, and only by virtue of that status. If his father were not then a

merchant, he was not the son of a merchant and had no right to enter the United States. If, nevertheless, he succeeded in obtaining entry into this country, he was unlawfully here and was at all times subject to deportation.

II.

The appellant could acquire no right to remain in this country if his original entry was unlawful.

If the appellant's father were not a merchant, the entry of the appellant was unlawful, and he was subject to deportation. No subsequent act of his could place him in any better position. His becoming a merchant subsequently could avail him nothing.

United States v. Chu Chee, 93 Fed. 797.

It follows, therefore, that the original entry of this alien being unlawful, he acquired no status as one of the exempt classes by any conduct of his own within this country, and having departed from this country and returned, he could only lawfully return by procuring from the Chinese government and presenting at the port of entry the certificate required by section 6 of the Chinese Exclusion Act (Act of Congress of May 6, 1882, amended by Act of July 5, 1884). This he failed to do, hence his last entry into the United States in 1911 was in violation of a law of the United States, to-wit: the Chinese exclusion laws, and therefore the alien was subject to deportation under an order of the Secretary of Labor, pursuant to authority conferred by section 21 of the Immigration Act of February 20, 1907.

III.

The preinvestigation and permission to return is of no effect.

Nothing is better settled than that the admission of an alien by immigration officials is not an adjudication of the right of the alien to enter, and is not conclusive in a subsequent proceeding looking to the deportation of the alien.

> Lew Quen Wo v. United States, 184 Fed. 685;
> Pearson v. Williams, 202 U. S. 281;
> Li Sing v. United States. 180 U. S. 486;
> United States v. Lim Jew, 192 Fed. 644;
> *Ex parte* Wing Yee Toon, 227 Fed. 247.

When the appellant himself gave testimony which, if true, would overcome any presumption or showing arising from the pre-investigation proceedings, and which affirmatively showed that he was unlawfully in this country, it was not error to order his deportation.

IV.

The warrant issued by the Department of Labor is sufficient.

For the first time in this court it is claimed that the departmental warrant does not state sufficient facts to advise the appellant of the charge against him. The warrant charges him in general terms with being in the United States unlawfully, in violation of the Chinese exclusion acts. The answer to this suggestion is found in a recent ruling of Judge Bledsoe, that "the proceeding being of necessity essentially summary in

Sibray vs. United States,
227 Fed. 1-

itself, no over-refined niceties in the way of pleading are to be expected nor demanded." In the case in which this language was used the objection was made that the warrant failed to state in what manner the petitioner had been connected with a house of prostitution, and this objection was overruled by the court.

Ex parte Hidekuni Iwata, 219 Fed. 610.

Moreover, the alien went to hearing without any objection on this ground, though represented by counsel. He made no claim of any insufficiency of the warrant or any indefiniteness of the matter stated in it, but on the contrary himself offered evidence and was fully heard in support of his right to remain in the United States. The hearing proceeded from beginning to end without objection to the sufficiency of the warrant, and without suggestion on the part of the alien or his counsel that there was any lack of particularity or any failure to fully inform him of the charge against him. In these circumstances, then, any such objection, even if well founded, must be regarded as waived.

Grant Bros. Const. Co. v. U. S., 232 U. S. 647.

Certainly no more strictness is required in a departmental warrant, by which proceedings of this character are initiated, than in a complaint in a proceeding for deportation before a United States commissioner. The Circuit Court of Appeals of this circuit has held that a complaint simply charging the accused with being unlawfully within the United States, without specifying in any particular in what respect his pres-

ence is unlawful, or in what respect he had violated the Chinese exclusion law, was sufficient, the court saying, "The complaint was in the usual form in such cases, and we think sufficiently pleaded the ultimate fact involved in the charge."

Ex parte Jim Hong, 211 Fed. 73.

V.

The admissibility of affidavits.

Again, complaint is made in this court for the first time that certain affidavits were erroneously admitted. But proceedings before immigration officials are not governed by the rules of evidence prevailing in courts of law.

United States v. Uhl, 215 Fed. 573.

And *ex parte* affidavits are admissible.

Ex parte Garcia, 205 Fed. 53.

These affidavits were received by the immigration officials without objection, though counsel for the alien was present, full opportunity was given to answer any of the statements contained in them, and no request was made for an opportunity to cross-examine the affiants or for time to controvert their statements. The appellant is therefore in no position to complain of the admission of the affidavits or statements.

Ex parte Hidekuni Iawata, 219 Fed. 610;

In re Rhagat Singh, 209 Fed. 700.

VI.

The extent of review on Habeas Corpus.

The record shows that the appellant was given a fair hearing before the immigration officials.

Choy Gum v. Backus, 223 Fed. 487.

"Where a fair, though summary, hearing has been given, in ascertaining whether there is or is not any proof tending to sustain a charge involved in a case like this, it is not open to courts to consider either admissibility or weight of proof according to the ordinary rules of evidence, even if it believe the proof was insufficient and the conclusion wrong."

Frick v. Lewis, 195 Fed. 693; affirmed in 233 U. S. 291.

It is submitted that there was abundant evidence in this case to sustain the conclusion of the Department of Labor, and that the order of the court below should be affirmed.

Thomas A. Flynn,
United States Attorney;
Samuel L. Pattee,
Assistant United States Attorney,
Counsel for Appellee.